

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

15-P-675

TRUSTEES OF THOMAS GRAVES LANDING CONDOMINIUM TRUST & another¹

vs.

PAUL GARGANO & another.²

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Following a bench trial, a judge of the Land Court entered a declaratory judgment stating the alleged easement held by the defendants, Paul and Shelia Gargano (together, the Garganos), was null and void because the plaintiffs, the trustees of Thomas Graves Landing Condominium Trust (trustees), never obtained the necessary consent to validly grant to the Garganos and their predecessors in interest³ an easement over the disputed area

¹ Scott Schlissel.

² Shelia Gargano. As Shelia Gargano did not file a brief or argue before the panel, we consider only Paul Gargano's appeal. We refer hereinafter to Paul Gargano as Gargano.

³ The Bank of New England initially acquired the Garganos' condominium unit (Unit C-1) from the developer. When the Bank of New England failed, the Federal Deposit Insurance Corporation (FDIC) came to own several of the condominium units and placed them in a "real estate owned" division called Barnside Realty Corp. (Barnside). The trustees granted Barnside an exclusive easement appurtenant to unit C-1 for parking in "Area B." After Barnside successfully petitioned the planning board of Cambridge

(Area B). On appeal, Gargano claims the judge erroneously ordered the entry of a declaratory judgment for the trustees. We affirm.

Gargano's claims, both in his brief and at oral argument, are not easily deciphered,⁴ but the gravamen of his argument is that the judge erred in finding the easement void. We disagree. Pursuant to G. L. c. 183A, § 5(b), as amended through St. 1987, c. 87, as in effect when the trustees granted the easement in 1993: "The percentage of the undivided interest of each unit owner in the common areas and facilities as expressed in the master deed shall not be altered without the consent of all unit owners whose percentage of the undivided interest is affected, expressed in an amended master deed duly recorded." Under the statute as it existed in 1993, because an exclusive parking easement would alter the unit owners' percentage interests in the condominium common areas, the grant of such an easement was ineffective without the consent of one hundred percent of the unit owners. See Kaplan v. Boudreaux, 410 Mass. 435, 443 (1991); Strauss v. Oyster River Condominium Trust, 417 Mass. 442, 445-446 (1994). Because the parties explicitly stipulated

to use unit C-1 as a professional office, Gargano purchased the unit.

⁴ We have carefully considered and attempted to parse each of the arguments presented in Gargano's brief. To the extent that any particular claim has not been specifically addressed herein, we have found it to be without merit.

at trial that the trustees did not obtain consent for the easement from any unit owner, the judge properly determined that the easement was void.⁵

In challenging the judge's findings, Gargano claims one hundred percent consent was unnecessary because "a developer may retain a property interest by excluding it from the interest subjected to the condominium statute," and Area B was not a common area. Strauss, supra at 446. Despite Gargano's assertions to the contrary, the condominium master deed makes no reference to Area B. Furthermore, the master deed describes the area that comprised Area B as part of the "Premises" included within the section entitled "Common Elements." Notably, the master deed does reserve a right to grant exclusive parking easements to "the parking spaces located both in the first level garage and outside," but the judge found no evidence, nor has Gargano challenged, that any of these spots are within the

⁵ Although the 1998 amendment to G. L. c. 183A, § 5(b), see St. 1998, c. 242, § 5, overruled Kaplan and Strauss, supra, the amended statute also would not validate the granting of this easement. Under the 1998 amendment, condominium trustees do not have the right to grant exclusive parking easements themselves and must obtain consent from "(a) all owners and first mortgagees of units shown on the recorded condominium plans as immediately adjoining the limited common area or facility so designated and (b) 51 percent of the number of all mortgagees holding first mortgages on units within the condominium who have given notice of their desire to be notified thereof." G. L. c. 183A, § 5(2)(ii). Even if the 1998 amendment to G. L. c. 183A, § 5(b), applied retroactively, the easement, for which the trustees received zero percent consent, does not comply with the terms of either version of the statute.

disputed Area B. The claim that Area B was not a common area therefore fails.⁶

For the first time on appeal, Gargano also raises the issue of subject matter jurisdiction, claiming that because the FDIC was his predecessor in interest, the trustees lacked standing to properly bring their claims. Although his argument is largely indecipherable, he seems to imply that the trustees failed to follow necessary administrative processes pursuant to 12 U.S.C. § 1821(d) (2012) before bringing a claim against the FDIC or, alternatively, failed to join the FDIC as a mandatory party pursuant to Mass.R.Civ.P. 19(a), 365 Mass. 765 (1974). We disagree.

Although Gargano is entitled to raise the issue of subject matter jurisdiction at any time, see Commonwealth v. DeJesus, 440 Mass. 147, 151 (2003), we are unable to discern how either provision applies where the trustees did not challenge the FDIC's authority as conservator or receiver under 12 U.S.C. § 1821(d), but instead contested the trustees' authority to grant the easement to the FDIC without one hundred percent unit owner consent. Furthermore, there was no need or basis to join the FDIC as a necessary party under the provisions of

⁶ Gargano now claims that the easement was included in the master deed and was therefore valid. Because he raises this issue for the first time on appeal, it is waived. See Matter of the Trusts Under the Will of Crabtree, 449 Mass. 128, 153 (2007).

Mass.R.Civ.P. 19(a). The Land Court's jurisdiction over "[a]ll cases and matters cognizable under the general principles of equity jurisprudence where any right, title or interest in land is involved," therefore includes this dispute brought by the proper parties. G. L. c. 185, § 1(k).

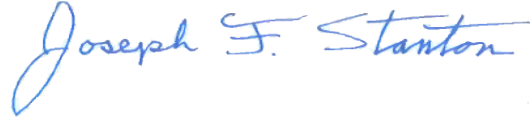
Gargano also alleges a multitude of affirmative defenses and equitable arguments, none of which has merit. First, the judge's proper finding that the easement was void defeats a number of these claims. See, e.g., Davenport v. Broadhurst, 10 Mass. App. Ct. 182, 187-188 (1980) (laches does not assist one "in acquiring an easement" [emphasis supplied]); Keville v. McKeever, 42 Mass. App. Ct. 140, 157-158 (1997) (bona fide purchaser status does not overcome void deed). Moreover, to the extent Gargano asserts any additional claims, his arguments are "conclusory in nature and lack[] any articulated reasoning."⁷ Commonwealth v. Springer, 49 Mass. App. Ct. 469, 477 (2000). We therefore decline to consider his claims further because they do

⁷ Gargano's brief lists seventeen separate issues and doctrines of law with no further explanation under his "Statement of the Issues" and contains three pages of largely incoherent argument.

not rise to the level of appellate argument. See Mass.R.A.P.
16(a)(4), as amended, 367 Mass. 921 (1975).

Judgment affirmed.

By the Court (Meade,
Wolohojian & Hanlon, JJ.⁸),



Clerk

Entered: June 23, 2016.

⁸ The panelists are listed in order of seniority.